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Before the
Federal Communications Commission
Washington, DC 20554

Accepted/Filed

APR 14 2014

FCC Office of the Secretary

In the Matter of:

Petition for Closed Captioning Exemption et al.) CGB-CC-0949
) CG Docket No. 06-181
La Santa Misa ("Sunday Mass") of the)
San Fernando Cathedral of San Antonio (TX))

To: Secretary

REPLY TO
OPPOSITION TO APPLICATION FOR REVIEW

The San Fernando Cathedral of San Antonio ("SFC"), timely submits this Reply to the procedurally unorthodox "Letter Opposition" of certain "Consumer Groups," dated April 2, 2014 ("Opposition").¹ It is unnecessary to contest the Opposition procedurally, however, because the Opposition, inter alia, fails to refute or even challenge on any basis whatsoever SFC's entitlement to a "categorical exemption" from the FCC's closed captioning rules, pursuant to Section 79.1(d)(8) of the FCC's rules. The Opposition also is totally silent with regard to SFC's argument that, on the record evidence taken as a whole, SFC is entitled to a "waiver" of the FCC's closed captioning rules.

1. In the Opposition's scant, three-paragraph text there is no specific response whatsoever to SFC's asserted entitlement to a "categorical" exemption. Opposition at 1-3. Indeed, its severely truncated "argument" was limited to only abbreviated discussions regarding (i) SFC's threshold constitutional issue and (ii) SFC's *alleged* failure, in 2013, to "update" its 2009 Petition

¹ The "Opposition," received by SFC's counsel by mail on April 4, 2014, was in the form of a Letter, to which was attached an Opposition filed by the "Consumer Groups" in a totally separate FCC proceeding.

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regarding its argument that, alternatively, SFC is entitled to an “individual” exemption pursuant to Section 79.1(f) of the FCC’s rules, which exempts programming where mandating closed captioning would be “economically burdensome.” *Id.* at 2.²

2. Even assuming arguendo that SFC’s extensive evidence supporting the entitlement of its Sunday Mass telecast to an “individual” exemption is “incomplete,”³ the FCC’s failure even to consider – much less to articulate a reasonable basis for denying SFC a “categorical” exemption under Section 79.1(d)(8) -- is reversible error. See Public Media Center v. FCC, 587 F.2d 1322, 1331 (D.C. Cir. 1978) (FCC must clearly and fully articulate its basis for any decision and must Engage in reasoned decision-making). Neither the FCC’s February 11, 2014 Letter nor its prior, November 5, 2013 Letter engages in even a cursory discussion of SFC’s entitlement to a “categorical” exemption from the closed captioning rules. Instead, both Letters focus on SFC’s alleged failure to present “adequate” evidence regarding the “economic burden” that closed captioning would have on SFC’s Sunday Mass.⁴ None of these evidentiary issues has any relevance to SFC’s claim of entitlement to a “categorical exemption.

² The FCC’s request in November 2012 for an evidentiary “update” was requested indiscriminately with respect to every Petition that was pending at that time and, thus, did not reasonably reflect an FCC judgment that SFC’s evidentiary record, or that of any petitioner, was “incomplete.” Indeed, the extensive, detailed evidence submitted initially in SFC’s Petition clearly met ab initio the “economically burdensome” standard. See SFC’s “Petition for Exemption and/or Waiver” at Appendices A, B and C. Moreover, SFC’s **additional evidence**, submitted December 4, 2013, was SFC’s **second** evidentiary “update,” to its 2009 Petition. Indeed, in response to the FCC’s April 5, 2012 prior request for an evidentiary “update” from all pending petitioners, SFC filed a lengthy “Supplement to Petition for Exemption and/or Waiver” on July 5, 2012, which contained substantial additional evidence on, inter alia, the “economically burdensome issue.” *Id.* at Appendix A, at ¶ 3 (detailed evidence that closed captioning would be so economically burdensome as to force the SFC to cancel the Sunday Mass telecast).

³ As argued in its Application for Review, SFC provided the FCC with detailed evidence, in three separate submissions, as to the “economic burden” that closed captioning would have on the Sunday Mass telecast, including the dispositive testimony that such an imposition of closed captioning on the Sunday Mass would, in fact, force SFC’s “cancellation” of the Sunday Mass, a result for which no greater “burden” could be established.

⁴ Specifically, the FCC’s February 11, 2014 Letter dismissing SFC’s Petition refers ONLY to SFC’s alleged failure to present evidence as to boilerplate matters regarding “documentation of SFC’s “financial status,” the “costs” of captioning “specific to your program,” verification that SFC sought “assistance” from the program distributor [which is redundant in this case] and verification that SFC sought “other sources of revenue.” *Id.* at 1.

Indeed, the FCC's unlawful disregard of SFC's argument regarding its entitlement to a "categorical" exemption is amply illustrated by language in the FCC's November 5, 2013 Letter. After its cursory response to SFC's constitutional argument, the FCC boldly contends that "the issue before the Commission" is whether SFC has made "the showing required" for "an exemption pursuant to Section 79.1(f), which concerns *only* "procedures for exemptions based on [the] economically burdensome standard." In short, SFC's Petition was unlawfully dismissed because the FCC not only failed to "fully articulate" a reasoned basis for the agency's rejection of SFC's asserted right to a "categorical" exemption, the FCC failed in this case *even to consider* SFC's claim of entitlement to this *separate* statutory basis for an exemption from the FCC's closed captioning rules. See Public Media v. FCC, supra.

3. Furthermore, the FCC not only failed to consider SFC's right to one of two exemptions that the FCC's rules explicitly make available to a petitioner such as SFC, the FCC also failed in this case even to consider – much less to provide an articulate disposition regarding – SFC's separate argument that the facts in this case, taken as a whole, entitle the SFC's Sunday Mass to a "waiver" from the FCC's closed captioning rules.

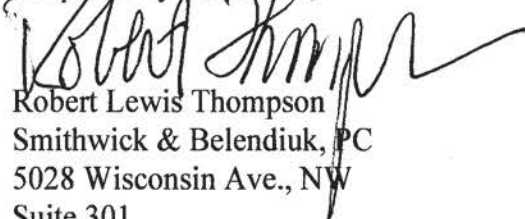
It long has been clear that any petitioner may seek a waiver of any FCC rule "for good cause shown." See, generally, WAIT Radio v. FCC, 418 F. 2d 1153 (D.C. Circuit 1969). The facts adduced by SFC in three separate evidentiary submissions in this case, show that "good cause" has been established for the FCC to waive its closed captioning rules as they apply to SFC's Sunday Mass telecast. Since SFC first articulated the entitlement of its Sunday Mass to a "waiver" from the FCC's closed captioning rules, the FCC has failed even to acknowledge that SFC has raised this independent basis for the FCC to grant administrative relief to SFC

with regard to the closed captioning of its Sunday Mass. Thus, neither in its April 5, 2012 Letter, nor its November 5, 2013 Letter, nor in its February 11, 2014 Letter has the FCC even referred to this issue, even when the SFC has emphasized the importance of this issue in the heading of its pleading itself.⁵ Even in its 2009 Petition, SFC noted that the FCC has held in analogous circumstances that non-profit entities, such as the San Fernando Cathedral, have been entitled to "waivers of certain FCC regulations." Id. at 5-6. SFC argued that to deny a waiver to the non-profit, eleemosynary petitioner in this case would be an arbitrary and capricious departure from FCC precedent. Id. at 5. The SFC further argued that to force the cancellation of the SFC's Sunday Mass would conflict with other FCC rules designed to promote local programming.⁶

CONCLUSION

In view of the foregoing, the FCC's dismissal of SFC's Petition should be reversed, set aside and appropriate relief should be granted to SFC with regard to its Sunday Mass telecast.⁷

Respectfully submitted,



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⁵ SFC's first pleading in this case, in 2009, is styled "Petition for Exemption **and/or Waiver**," emphasis added. Accord: "Supplement to Petition for Exemption and/or Waiver," filed July 5, 2012.

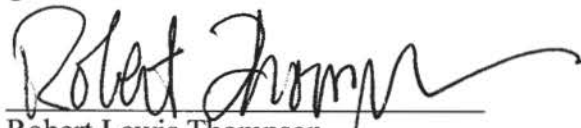
⁶ See, e.g., "Supplement to Petition for Exemption and/or Waiver," filed July 5, 2012 at 2, 7-8 & note 20.

⁷ SFC respectfully advises the FCC that, on the basis of information received since the Application for Review was filed last month, SFC no longer relies on its prior citations to the U.S. Catholic Conference of Bishops, as support for its constitutional argument.

CERTIFICATE OF SERVICE

I, Robert Lewis Thompson, Of Counsel to Smithwick & Belendiuk, P.C., certify that on April 14 2014, a copy of the foregoing "Reply to Opposition to Application for Review," filed by "Consumer Groups" was served on the below-named counsel by prepaid, First Class US mail.:

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